

FINAL STATEMENT OF REASONS AND PUBLIC REPORT
DEPARTMENT OF PESTICIDE REGULATION

Title 3. California Code of Regulations
Amend Sections 6000, 6720, 6738, and 6793, and Adopt Section 6739
Pertaining to Respiratory Protection

UPDATE OF THE INITIAL STATEMENT OF REASONS

The originally proposed regulatory action was noticed in the *California Regulatory Notice Register* on May 12, 2006.

During the 45-day public comment period, the Department of Pesticide Regulation (DPR) received comments on the originally proposed text. The comments are discussed under the heading "Summary And Response To Comments Received" of this Final Statement of Reasons. During the review of these comments, DPR determined that a number of the suggested changes should be included in a modified text. These changes and the reasons for them are found below under the heading "CHANGES TO THE TEXT OF PROPOSED REGULATIONS."

During the 15-day period provided for public comment on the Modified Text of Proposed Regulations, no comments were received.

DPR has amended sections 6000, 6720, 6738, and 6793, and adopted section 6739 of Title 3, California Code of Regulations (3 CCR). The regulatory action pertains to respiratory protection worn by employees working with pesticide materials. In summary, this action revises the written respiratory protection program that employers must establish when employees are required by pesticide label, restricted materials permit, or regulation to use respirators in the workplace.

CHANGES TO THE TEXT OF PROPOSED REGULATIONS

DPR made sufficiently related changes to the text since it was originally proposed.

- DPR modified section 6000 to add the definitions, "confidential reader" and "respirator program administrator." These definitions are needed to clarify the proposed regulatory action in section 6739.
- DPR modified section 6739(a) to further clarify when an employee should wear respiratory protection, and that the respirator program administrator is responsible for administering the respiratory protection program.
- Section 6739(b) has been modified to require that voluntary respirator provision information, as specified in subsection (r), be displayed either alongside the Hazard Communication Information for Employees Handling Pesticides in Agricultural Settings (Pesticide Safety Information Series leaflet A-8) or Hazard Communication Information for Employees

Handling Pesticides in Noncrop Settings (Pesticide Safety Information Series leaflet N-8), as applicable, at a central location in the workplace.

- DPR modified subsection 6739(n) to include maintaining a written record of respiratory program evaluations conducted annually.
- Subsection 6739(p) has been modified to clarify record retention requirements for medical recommendations, fit testing, and respirator program.
- Section 6739(q) has been modified to correct an inadvertent grammatical error.

PUBLIC HEARINGS

DPR received no requests to hold a public hearing and no hearing was scheduled or held.

MANDATE ON LOCAL AGENCIES OR SCHOOL DISTRICTS

DPR has determined that the proposed regulatory action does not impose a mandate on local agencies or school districts requiring reimbursement by the State pursuant to Part 7 (commencing with section 17500) of Division 4 of the Government Code because the regulatory action does not constitute a "new program or higher level of service of an existing program" within the meaning of Section 6 of Article XIII B of the California Constitution. DPR has also determined that no nondiscretionary costs or savings to local agencies or school districts will result from the proposed regulatory action.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED

DPR has received four letters/e-mails of comment regarding the proposed regulations. They were submitted by: Renee Pinel, President/CEO, Western Plant Health Association (commentor #1); Terry Gage, President, California Agricultural Aircraft Association (commentor #2); Anne Katten, California Rural Legal Assistance Foundation (commentor #3); and Cathy V. Neville, Agricultural Commissioner, San Diego County (commentor #4).

Comment No. 1 (commentor #1): We are concerned that the proposed regulations could pose a burden for the smaller farm owner/operator who has employees that will handle pesticides. For these growers, requirements for medical evaluation, training, and written record keeping will add overhead costs to the operation. DPR estimates that there are ~6,000 worker who use respirator that fall under the provisions of these regulations. DPR also estimates that 50% of the workers

are already involved in annual medical examinations as required by their employer. That may leave ~3,000 workers who will require annual physical evaluations and documented training.

Response: DPR would first like to clarify that annual physical evaluations are not required under the proposed regulation. After the initial physical evaluation (either by use of the medical questionnaire or direct physician examination), additional physical evaluations are only triggered under the provision of section 6739(d)(6), to wit: medical signs or symptoms related to respirator use; physician, supervisor, or program administrator believes a reevaluation is necessary; observations during fit testing or program evaluation indicate a need for reevaluation; initial conditions of workplace change in a way to increase employees physical effort to perform job while wearing respiratory protection.

Other than the new cost of the evaluation of the questionnaire, the overhead costs of "... training and written record keeping ..." should not represent an additional cost, since under the current respiratory protection regulation employers required to make sure that "Written operating procedures for selecting, fitting, cleaning and sanitizing, inspecting and maintaining respiratory protective equipment are adopted." [section 6738(h)(3)].

Additionally, handler training, as required under 3 CCR section 6724(b)(8), tasks the employer with ensuring that workers are trained in the "... Need for, limitations, appropriate use, and sanitation of, any required personal protective equipment..." " An employer who is in compliance with the present regulations will largely be in compliance with the proposed regulation.

Of the issues mentioned by this commentor, the only new requirement is the medical evaluation. It should be noted that the estimated-cost information gathered in the Sacramento Metro region in 2005 for physician review of the medical questionnaire was less than \$50. In addition, if further medical screening is necessary, this may indicate that an employee wearing the proposed respirator may have a serious medical problem that the use of respiratory protection could exacerbate. Such pre-deployment information may offset the costs of additional tests and evaluations.

Comment No. 2 (commentor #2): We have several concerns regarding these proposed changes. Specifically, we are concerned about the term "confidential reader". Who is qualified to be a "confidential reader"? The text states that the employer or supervisor cannot review the questions. This could require the hiring of additional staff to administer the questionnaire. Additionally, how often is the medical evaluation form to be administered?

Response: DPR agrees and revised the proposed regulatory language to include the definition of "confidential reader" to section 6000.

As noted in the response to comment no.1, the medical evaluation need only be done once, unless certain trigger criteria [section 6739(d)(6)] are met. Only the fit testing is required to be performed annually [section 6739 (e)(1)].

Comment No. 3 (commentor #3): Cal-OSHA regulation T8CCR5144a requires control of atmospheric contamination as far as feasible by engineering controls and substitution of less toxic materials. We urge the Department to add this language which recognizes accepted industrial hygiene control hierarchy, to the proposed regulation. This would reinforce other state regulations and policies which require use of engineering controls for mixing and loading the highest toxicity pesticides and encourage the use of integrated pest management.

Response: The industrial hygiene hierarchy of exposure control is beyond the scope of this regulation, which is the use of respiratory protective equipment. DPR also does not use explanatory preambles in its regulatory text.

Comment No. 4 (commentor #3): The OSHA definition "Tight-fitting facepiece means a respiratory inlet covering that forms a complete seal with the face" should be added to section 6000 accordingly.

Response: DPR does not believe it is necessary to define "tight-fitting facepiece" and that the phrase defines itself. DPR also believes many people would not know what a "respiratory inlet covering" (Cal/OSHA definition) is.

Comment No. 5 (commentor #3): Cal-OSHA regulation, T8CCR5144a specifies that employers have a duty to provide respirators when they are necessary to protect employee health and this duty should be included in these regulations to provide equivalency. In addition, while some pesticide labels clearly specify the type of respirator required for different types of applications, such as outdoor versus greenhouse, some labels still only contain the directive to "avoid breathing spray mist or dust". Clearly, it is impossible to avoid breathing the spray while using equipment such as air-blast sprayer which disperse the pesticide in the applicator's breathing zone. This regulation should therefore specify that respiratory protection is required whenever the label says to avoid breathing spray mist or dust and the application method disperses spray or dust in the handler's breathing zone.

Response: In part, DPR agrees with this comment and modified the text of the proposed regulation [section 6739(a)(1)(A)] to clarify the requirement that respiratory protection must be provided to employees when handling pesticides where respirators are required by label, permit condition, or regulation.

The use of respiratory protection is primarily controlled by the requirements of the U.S. Environmental Protection Agency (U.S. EPA)-approved label. U.S. EPA defines the type of

respiratory protection and the conditions of use on the label. Issues concerning the validity of U.S. EPA decisions concerning respirator use are beyond the scope of this regulation. Additionally, it would not be possible for a regulation to specify the necessary type of respiratory protection required at each work site where the worker cannot "avoid breathing spray mist or dust" and, as the commentor noted, this label directive does not provide any guidance as to the proper respiratory protection to use in such conditions. Assessment of work site respiratory hazards inadequately addressed by label directions is beyond the expertise of county agricultural commissioner's staff and many employers. However, this does not mean that the worker is completely unprotected in regards to avoiding the unaddressed respiratory hazard, inasmuch as the county can invoke 3 CCR section 6706, Hazardous Areas, to prevent the unavoidable breathing of spray mist or dust.

Comment No. 6 (commentor #3): This proposal leaves the decision as to whether or not a follow-up medical examination is necessary entirely up to the medical provider. In contrast, the OSHA regulation requires a medical evaluation whenever there is a positive response to certain questions in the medical evaluation questionnaire. We recommend this more fail-safe, proscriptive approach.

Response: Section 6739(q) allows the physician, using his/her professional judgment and experience, to ascertain if the responses to questions in subsection (q) Sections One and Two require further evaluation of the worker's ability to wear respiratory protection in a pesticide-handling environment. The physician may elect to use Title 8, section 5144, Appendix C, Part B to gather further information or may use some other means to determine suitability for wearing respiratory protection. DPR has no authority to regulate a physician's activities. Since the questionnaire is confidential and the employer cannot know the answers to the questions, DPR cannot require the employer to obtain a medical evaluation in response to positive responses to certain questions. Thus, DPR defers to the physician's conclusions as to the necessity of a medical evaluation and to provide for their patient's safety and health.

Comment No. 7 (commentor #3): We are concerned that proposed section 6739(j) which allows some air cylinders to fall to 80% of recommended pressure level before recharge could compromise the safety of fumigation workers, especially if such an SCBA ends up being used for a rescue operation. In contrast, Cal-OSHA regulations require recharge when pressure falls to 90%.

Response: Self-contained Breathing Apparatus (SCBA) designated for emergency use must be kept at 100 percent tank capacity and inspected monthly. SCBA use by fumigation workers is a routine use. Unlike other users of SCBA, such as firefighters, HAZMAT crews, permit-requiring confined space workers, and mine rescue personnel, fumigation workers are not normally in multi-hazardous environments where time is critical and immediate escape from the perilous environment may be delayed or impossible. The vast majority of situations where workers are

entering enclosed fumigations involve walking in to check for completeness of aeration. Emergency egress is not normally impeded in such conditions. Even if the SCBA were to activate its low-pressure warning signal, it is simply a matter of the worker exiting the environment the same way they entered. Therefore, DPR believes that SCBA used for routine procedures (checking aeration) may be allowed to be at 80 percent tank capacity at the start of the workday. Tanks below that level must be recharged before being placed back into service, tanks which drop below 80 percent during the course of the day may be used until the low pressure warning is activated, at which point the worker must exit the SCBA-requiring environment and exchange tanks.

Comment No. 8 (*commentor #3*): We appreciate the effort that the Department has made to accommodate low literacy workers by requiring the person administering the questionnaire to ask the employee, "Can you read and understand this questionnaire?" and offer the assistance of a confidential reader if the reply is "No". However, in some cases, the employee may be able to read the beginning of the questionnaire but have difficulty later. We recommend that the person administering the questionnaire be required to tell the employee that they can ask for assistance if they have difficulty reading any portion of the questionnaire [*sic*]. For a worker who has sufficient literacy to keep track of which question number they are on and understand the answer options of yes or no, the reader can utilize a separate copy of the questionnaire [*sic*] so they will not be able to observe the answers which are marked.

Response: The instructions for the questionnaire state, "The person administering the questionnaire shall offer to read or explain any part of the questionnaire to the employee in a language and manner the employee understands." DPR believes this requirement and the inclusion of the "confidential reader" requirement sufficiently addresses this concern.

Comment No. 9 (*commentor #4*): Section 6739 (a)(1)(I)(1): To assist in enforcement, the term "qualified" should be defined in section 6000. In section 6724, the qualified trainer is defined and this is helpful for the inspector in the field.

Response: This requirement was brought directly over from Title 8 CCR section 5144 (c)(3). The term "qualified" was not defined by Cal/OSHA in section 5144, which itself is derived from the federal Department of Labor regulation 29 CFR section 1910.134. In the Final Rule concerning this regulation (Fed. Reg./Vol. 63, No. 5/ Thursday, January 8, 1998) OSHA discusses the requirements for being "qualified" (pages 1193-1195). Because of the varied nature of respiratory protection requirements ("An employer's respirator usage may be limited to dust respirators or may have a wide variety of types covering both air-purifying and atmosphere-supplying respirators. Program administrator training/qualifications would need to cover a wider range of topic in the latter case than in the former case."), specific training qualifications are difficult to establish. As OSHA stated: "Specifying in detail the type and extent of training required for program administrators depends upon the type of workplace and is best left to the

employer." Though DPR generally concurs with this approach, the Department has removed the word "qualified" and modified the proposed text to add the definition of respiratory program administrator to section 6000. This should provide guidance for establishing if the program administrator is qualified.

Comment No. 10 (*commentor #4*): Section 6739 (g)(2): This section would apply to entry into fumigated structures. It is not possible in most instances to communicate with the fumigator who is inside the structure. How would a structural fumigator comply with this section?

Response: Three methods of communicating with a worker inside a fumigated structure are declared in the regulation: visual, voice, or signal line. The meanings of these are fairly straightforward:

- Visual: Can the worker be seen, in some part, by the person outside? They need not be seen clearly (through glass brick, for example) or completely (the outside person can only see their feet) or continuously (momentarily losing sight of the inside worker as they move into another room and the watchman needs to shift observation sites is permissible). The key aspect is that the watchman can readily establish that the inside worker is not in any distress (i.e. erect and moving).
- Voice: Can the outside worker call to the inside worker and hear their response or can they be equipped with wireless communication devices (walkie-talkies)? Can the inside worker be equipped with a safety device (no-motion alarm) that emits a signal when the worker either becomes horizontal (falling over) or immobile (passing out)? Continuous chatter is not required, only that the watchman can readily establish the condition of the interior worker.
- Signal line: This can be as simple as a rope tied to the interior worker that the watchman can periodically tug and feel for a return tug, or more sophisticated telemetric tracking devices that continuously transmit the interior worker's condition.

Given the range of methods available, compliance should not be difficult for structural fumigators. Workers may also switch from one system to another, as conditions dictate (e.g., if the watchman loses sight of the interior worker, they can use voice methods until the interior worker becomes visible again).

Comment No. 11 (*commentor #4*): In Section 6739(n)(2) "The employer *shall annually consult employees* required to use respirators to assess the employee's views on program effectiveness and to identify any problems. Any problems that are identified during this assessment shall be corrected." Does this consultation need to be documented? For enforcement purposes documentation would be preferred.

Response: The annual consultation and evaluation of the program's effectiveness is to provide input into any necessary modifications of the written respiratory protection program. Any germane conditions or comments discovered during this procedure should ultimately be reflected in the effectiveness of the written program. Failure to evaluate the program will result in an inadequate written program. However, since documentation of the evaluation process may be necessary to ensure compliance, DPR modified the text of the proposed regulation [section 6739(n)(3)].

Comment No. 12 (commentor #4): It appears that the fit test record for an employee can be destroyed after another fit test is administered. It would seem that this record should be maintained to allow the inspector to determine past compliance. For example in the case of an investigation the original fit test could be important in determining grower compliance with 6739 however the grower need only state he has recently done a fit test and the inspector would not be able to prove the state of compliance when the incident occurred.

There is no retention time period for the fit test or copy of the written respirator program which is to be retained by the employer. Language such as that used in 6739(p)(1) would clarify retention periods for growers and aid in the enforcement of this section.

Response: On reviewing the text of subsection 6739(p), DPR agrees with this commentor that the text as written could allow for premature destruction of records, including fit test records. Under the present text, records required for an illness investigation could legally be destroyed, as noted in the comment. DPR modified the proposed text to address this concern by requiring the records be maintained while the employee is required to use respiratory protection and for three years after the end of employment conditions requiring respiratory protection, and the previous versions of the written respirator program will be maintained for three years.

Comment No. 13 (commentor #4): We suggest the addition of the word "confidential" to the text of the regulation to ensure that the employee questionnaire is administered in a private manner. The term "confidential reader" should be defined. An employee translating for another employee does not appear to be the intent of this section, but it is not precluded under the current language.

Response: Within the instruction text of the questionnaire, which is part of the regulation, the confidential requirement is explicitly stated. DPR believes this is sufficient. Coworker translation assistance is not prohibited; only intervention by the employer (other than providing an independent translator) is prohibited. As stated in the response to comment no. 2, a definition for the term "confidential reader" has been added.

Comment No. 14 (commentor #4): In Section 6739(q) it states that "Your employer must allow you to answer this questionnaire during normal working hours, or at a time and place that is

convenient to you. To maintain your confidentiality, ...*to deliver or send this questionnaire to the health care professional who will review it.*"

It appears that this should be the responsibility of the employer rather than the employee? Or at least a stamped addressed envelope should be supplied to the employee to facilitate this process.

Response: Inasmuch as the employer may not handle the completed document, a stamped, pre-addressed envelope is most likely the best method for delivering the completed form to the reviewing physician or licensed health care professional. However, as required under section 6739(a)(2)(I)(2): *The employer shall provide respirators, training and medical evaluations at no cost to the employee*; thus the employer must provide the envelope and stamp.

Comment No. 15 (commentor #4): Section 6739(r) states that an employer shall *ensure* that the following information is provided to employees who voluntarily wear a respirator when not required to do so by label, restricted materials permit condition, regulation, or employer. Currently there appears to be no requirement to maintain any documentation of the voluntary respirator information required to be provided to employees, for enforcement purposes this would be necessary.

Response: Under section 6739(b)(3), the employer allowing the voluntary use of respirators are tasked with implementing a written respiratory protection program if the respirators provided are not filtering facepiece (i.e. elastomeric). However, if the respirators are employee-provided or are filtering facepiece, no written program is necessary and only the information found in section 6739(r) need be provided to the workers. Other than the subsection (r) information requirement, no other requirements are placed on such voluntary use. There is nothing else to enforce. However, if the employer requires by policy, the wearing of respiratory protection when it is not required by label, regulation, or permit condition, this is NOT is voluntary respirator use under the provisions of subsection (b). A complete respiratory protection program is required in such a case.

To allow confirmation that the subsection (r) information is made available to workers, DPR modified the proposed text to subsection (b)(2) to require the employer to display the information at a central location in the workplace.

ALTERNATIVES DETERMINATION

The Director has determined that no alternative considered by DPR would be more effective in carrying out the purpose for which this regulation is proposed, or would be as effective and less burdensome to affected private persons or businesses than the proposed regulatory change.

POSTING REQUIREMENT

Section 6110 of Title 3 of the California Code of Regulations states in part that, "The public report shall be posted on the official bulletin boards of the Department, and of each commissioner's office, and in each District office of the DPR [Division of Pest Management, Environmental Protection and Worker Safety] for 45 days." DPR has posted its Initial Statement of Reasons and Public Report on its official bulletin board, which consists of the Department's Internet Home Page <http://www.cdpr.ca.gov>. In addition, copies were provided to the offices listed above for posting.